EXHIBIT A

salesman for Research Underwriters; is that correct?
A. Yes.
Q. Was that Mr. Steve Friedberg or his father or both; do you know?
A. I can't say which one specifically.
Q. Did you have any position with Research Underwriters other than as an insurance salesman?
A. No.
Q. As I think you know by now, we are here because of a lawsuit Mr. Friedberg filed in Philadelphia against various Mutual companies relating to some accounts that are currently at Morgan Stanley in Philadelphia. Do you know anything about that lawsuit?
A. No.
Q. Have you discussed the lawsuit since 2002 with Mr. Friedberg?
A. No.
Q. When was the last time you had any discussion with Mr. Friedberg?
A. It was prior to 2002.
Q. Have you discussed the lawsuit with Mr. Friedberg's lawyers?
A. No.
Q. Did you do anything at all to prepare for the deposition?

A. Nothing.
Q. Do you know Andy Lewis?
A. I do.
Q. When was the last time you had a discussion with Andy Lewis?
A. Five years ago. Maybe more.
Q. There are three accounts at issue in this lawsuit. One of them relates to U21, one of them related to E11, and one of them relates to E14. Do those account names ring a bell or numbers ring a bell to you?
A. They ring a bell. I don't know anything about them currently, but I am familiar with the numbers.
Q. Well, that's what we are here to try to understand what you know and, of course, if you don't know, if you don't remember, if that's the honest answer to any of my questions, please feel free to say that.
A. Sure.
Q. Did you have -- strike that.
Do you still have the shareholder's agreements you signed relating to U21, E14, and E11?
A. I do not.
Q. Did you leave those behind when you left Research Underwriters?
A. Not exactly left them, but they -- I was not

released in a traditional fashion, so I was not able to gather up any of my belongings.
Q. So let me ask it this way: Did you take any copies of the shareholder's agreements --
A. No.
Q. -- or any documents relating to those agreements?
A. None.
Q. Mr. Ouimette, let me ask you to refer to the documents in front of you, Exhibits to Deposition of Stephen Friedberg. I would like to ask you about the shareholder's agreements, and the first one I want to ask you about is at Exhibit 16.
MR. REGA: Doug, may I interrupt you to ask if you have another copy of that set?
MR. CHRISTIAN: I wish I did to help you out, but I do not.
MS. SMITH: Then we should probably take a break so they can be duplicated.
MR. CHRISTIAN: Let's go off the video record.
THE VIDEOGRAPHER: Off the record at 10:09.
(Discussion off the record.)
MR. CHRISTIAN: Back on the stenographic record.
Counsel for Mr. Friedberg have indicated they

did not bring previously marked exhibits with them.
MS. SMITH: That's what I just said.
MR. CHRISTIAN: But you didn't say it on the record, which is why I am.
MS. SMITH: I'm sorry. I thought the stenographic record was ongoing. It was not? Then the record should be clear. We did ask to take a break so that documents that have been handed to the witness as exhibits could be copied for our benefit. Mr. Christian has indicated he thinks that's unnecessary, given the fact that all the documents were previously marked as exhibits to Mr. Friedberg's deposition, and he has refused to take a break in the deposition for the purpose of providing copies of those to counsel for Mr. Friedberg during the deposition.
We then asked if we could at least examine the documents that have been handed to the witness before he is questioned on them, and then Mr. Christian indicated he would like to go back on the record. I did indicate in response to a question from Mr. Christian that we had not brought with us documents that have been previously marked to any of the other depositions in this matter, so I should note that we were not advised as to which exhibits, if any, were going to be made use of in this deposition. We would have had an opportunity then to

A. Yes.
Q. And another one is E11?
A. Yes.
Q. Do you know what prompted this document that established a 50 percent interest in each of those accounts?
A. No. No, I don't.
Q. Do you see after No. 4 it says, "We agree that my share of the principal and interest in these accounts is owed evenly between us"? Do you see that?
A. Yes.
Q. So that was a side agreement between you and Mr. Friedberg --
MR. REGA: Objection.
Q. (BY MR. CHRISTIAN) -- with regard to who owned your principal in interest -- your share of the principal in interest in these accounts; is that correct?
MR. REGA: Objection.
Q. (BY MR. CHRISTIAN) You can answer it.
A. You know, the letter -- I mean, I don't recall. The letter, I haven't seen this, but -- so I can't say.
Q. If you don't recall, that's fine.
A. I can't say.

Q. Mr. Ouimette, Exhibit 47 is a July 1, 1999 letter to Mr. Friedberg bearing Friedberg000080 Bates number.
(Deposition Exhibit 47 was marked.)
Q. Will you take a look at that please, sir. Have you had a chance to look at that, sir?
A. I have.
Q. Do you know whether you have seen that before?
A. No.
Q. The last paragraph of the letter states, quote, As a party to the Shareholder Agreements for the above-referenced programs, Mutual Indemnity will therefore only remit future profits at the joint written request of both yourself" -- i.e. Mr. Friedberg -- "and Mr. Mark Ouimette." Do you see that?
A. Yes.
Q. Was it your understanding that as of this time any distribution or emission of future profits would be at the joint written request of you and Mr. Friedberg?
A. I don't recall seeing -- I mean, this letter is -- it's been quite some time, so I --
Q. Whether you saw the letter or not, sir, I'm asking that concept --
A. Yes.
Q. -- of moneys not being paid except at the

joint request of you and Mr. Friedberg. Is that a concept you recall?
A. Yes.
Q. Sir, prior to this January 3, 1996 letter that we marked as Exhibit 46, was there any paperwork that indicated or established that Mr. Friedberg had any interest in U21 or E11?
A. I don't know.
Q. Prior to this January 3, 1996 letter, did you believe Mr. Friedberg had an interest in U21 and E11?
A. I did.
Q. Tell me about that, please.
A. We both were responsible for producing the business that generated the underwriting profits and we both worked equally on the construction of the programs and the work effort that went into it.
Q. So is it your testimony that from the very beginning you intended to give Mr. Friedberg some interest in these accounts?
A. Yes.
Q. Was there any document setting forth the transfer of any interest prior to January 3, 1996?
A. I don't know.
Q. And you have no recollection of what prompted the January 3, 1996 letter?

A. I don't.
Q. Was it your contemplation that from the very beginning of U21 whatever funds would be paid to you would be split evenly with Mr. Friedberg?
A. Yes.
Q. To your knowledge, was that his understanding as well?
A. I can't speak for him, but I think so.
Q. Well, let me ask it this way, Mr. Ouimette: Did he ever lead you to believe that he was entitled to more than 50 percent of the funds in U21?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Did he ever say that he was entitled to more than 50 percent of the funds in U21?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Pardon me?
A. No, not that I'm aware of.
Q. Did Mr. Friedberg ever lead you to believe in any way that he thought he was entitled to all of the funds relating to U21?
MR. REGA: Objection.
A. No. At that time?

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Q. (BY MR. CHRISTIAN) Yes, sir.
A. No.
Q. What's the distinction you are drawing when you say "at that time"?
A. Well, he is entitled to all of them now.
Q. As a result of your buyout?
A. Correct.
Q. But prior to your buyout, did he ever lead you to believe that he was entitled to all of those funds?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Answer again, please.
A. I said no.
Q. Thank you. You were a shareholder at one time of one or more of the Mutual companies; is that correct?
A. Yes.
Q. Do you recall signing any agreement with the Mutual companies, other than the shareholder's agreement or any amendment to the shareholder's agreement?
A. I may have, but I don't recall.
Q. Is it your understanding that the shareholder's agreement governed the relationship between you and the Mutual companies?
A. Yes.
Q. Is it your understanding that the moneys that

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would be paid to you by Mutual would be paid to you pursuant to the terms of the shareholder's agreement?
MR. REGA: Objection.
A. Probably pursuant to the agreement, but also based on the underwriting performance of the business that was specific to that account. So to the extent that it would have performed in some way better than what the agreement would have stated, it was probably my assumption that it was a negotiable item.
Q. (BY MR. CHRISTIAN) But the shareholder's agreement did speak to the money coming from Mutual and going to you; is that correct?
MR. REGA: Objection.
A. Yes.
Q. (BY MR. CHRISTIAN) Are you aware of any oral agreement between Mutual and you?
A. No.
Q. Are you aware of any oral agreement between Mutual and Mr. Friedberg?
A. No.
Q. Did Mr. Friedberg ever tell you there was an oral agreement between Mutual and Mr. Friedberg?
A. No.
Q. Did Mr. Friedberg ever tell you there was an oral agreement of any nature relating to this situation?

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A. No.
Q. Mr. Ouimette, I'm going to show you Exhibit 48, which is a Partial Redemption and Release Agreement relating to U21.
(Deposition Exhibit 48 was marked.)
Q. I will ask you to take a look at that, please. Sir, that's a document that you signed; is that right?
A. Yes.
Q. And you signed it on or about March 5, 2002?
A. Yes.
Q. It was also signed by Mutual Holdings and by Mr. Friedberg; is that your understanding?
A. Yes.
Q. Sir, can you tell me what your recollection is, even if generally, about the purpose of this agreement?
A. The purpose of the agreement was to allow my ex-wife and I to complete our property settlement in our divorce proceedings, which were long and difficult. It was a means to -- for us to divide up assets and move on with our lives.
Q. You received $500,000 pursuant to this agreement; is that correct?
A. I believe so. That's what the document says.
Q. That was in return for the redemption of your

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share in U21; is that correct?
A. Yes.
Q. Mr. Friedberg then became the sole shareholder of U21; is that correct?
A. Yes.
Q. And that was effective January 30, 2002; is that correct?
A. Yes.
Q. And as of that time he had sole interest in U21, correct?
A. Correct.
Q. Before that time he did not have sole interest in U21, correct?
A. I had minimal -- I had no interaction really with any of this business on or about from 1999.
Q. When I say "interest," I mean ownership.
A. Yes.
Q. So prior to January 30, 2002, he was not the sole owner of U21, correct?
A. Correct.
MR. CHRISTIAN: Let's take a short break.
THE VIDEOGRAPHER: Off the record at 10:43.
(Recess taken.)
THE VIDEOGRAPHER: On the record at 10:51.
Q. (BY MR. CHRISTIAN) Mr. Ouimette, we were

talking about Exhibit 48 that was effective January 30, 2002. That's the Partial Redemption and Release Agreement. Was your buyout that you talked about earlier by Mr. Friedberg something different than this?

A. No, not that I'm aware of.

Q. Did Mr. Friedberg pay you any money to buy out any of your interest?

A. No. I mean, other than what would be of record.

Q. Meaning what?

A. All the documents relating to money that I received to buy out any and all interest I had in any shares is of public record. It exists out there. The documents exist.

Q. Let me ask you this: Do you recall the approximate amount you received from Mutual relating to this buyout?

A. Well, I don't think I received anything directly from Mutual. I think I --

Q. Who did you receive it from?

A. I think I received it from Mr. Friedberg.

Q. And what amount, approximately?

A. For all shares, interest in all shares?

Q. Yes, sir.

A. $1.8 million.

Q. That was a negotiated amount; is that correct?

A. That is correct.

Q. Did Mr. Gary Gentile represent you in that negotiation?

A. He did.

Q. And did Mr. Pat Rega represent anyone in that negotiation?

A. My ex-wife.

Q. Did you understand at the time that he was also counsel to Steve Friedberg?

MR. REGA: Objection; leading. Just so the record is clear, I --

MR. CHRISTIAN: I will withdraw the question.

Q. (BY MR. CHRISTIAN) Have you at any time known whether Mr. Rega represented Mr. Friedberg?

A. No.

Q. Did you ever meet Mr. Rega prior to today?

A. Yes.

Q. When was that?

A. I have known Pat as a friend and as a skiing buddy for over ten years.

Q. Have you ever had any business dealings with Mr. Rega?

A. No.

Q. Have you ever met with him relating to any of

the issues involved in this lawsuit?

A. No.

Q. When was the last time you had a conversation with Mr. Rega prior to the deposition beginning?

A. It would have to be back to 2002 sometime.

Q. Did that relate to any aspect of this case or any of these issues involved in the case?

A. No.

Q. Do you know whether any of the moneys in the Legg Mason or Prudential -- strike that.

Do you know whether any of the moneys in the Legg Mason or Prudential or other brokerage house accounts that relate to U21 had been dividended by Mutual?

MR. REGA: Objection; leading.

A. I don't have any knowledge.

Q. (BY MR. CHRISTIAN) Look at Exhibit 12 if you will, please, sir. Is that a document you signed?

A. Yes.

Q. Is that a written request for dividends relating to E14?

A. It is.

Q. Do you recall any written requests for dividends relating to U21?

A. No.

Q. Will you look, please, sir, at Exhibit 3. That's a May 12, 2000 letter to one of the Mutual companies from Mr. Rega. Do you see where it says "Attorney for Steven M. Friedberg and Robing F. Ouimette"?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Then do you see Mr. Gary Gentile's name as your attorney? Do you see that?

A. Yes.

Q. Is this a document that anyone forwarded to you?

A. No.

Q. Was it standard practice for Mr. Gentile in representing you to send copies of correspondence he sent relating to the divorce proceedings?

A. Yes.

Q. Do you know for a fact that he did not send this to you?

A. No.

Q. You just don't recall?

A. Correct. It was a long, difficult divorce and there is a lot of paperwork, so I, you know --

Q. Sir, will you look, please, at Exhibit 6.

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A. No.
Q. Do you know what these notes refer to?
A. I have no idea.
Q. Let's go to the first page of Exhibit 40. Before we do that, sir, let's go to 36. Tell me when you are ready to be questioned about 36, please. Is that a document you've seen before today?
A. I have seen it. I saw it about a week ago when I was first made aware of this proceeding.
Q. There is a reference in the second sentence to, quote, Mr. Lewis's alleged $1,000,000 plus interest (See U21), closed quote. Do you see that?
A. I do.
Q. The author, Mr. Gentile, then says, quote, If he intends to hold back his full amount, contrary to what we discussed on the phone, then we may have a problem. As you will recall, it was our intention to make him participate proportionately in the $1.8 million claim of Mutual's. I believe his number would be something like 20 percent even without whatever adjustment Mark and Steve deemed appropriate, closed quote, and, of course, the letter continues. Do you recall any discussions regarding any interest or alleged interest Mr. Lewis had or may have or wished to have in U21?

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MR. REGA: Objection.
A. I don't.
Q. (BY MR. CHRISTIAN) Did you ever offer to give Andy Lewis an interest in U21?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Did you ever offer to give Andy Lewis a $1 million plus interest in U21?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Did you ever believe Andy Lewis was in any way entitled to a one-third interest in U21?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Did you ever offer Mr. Andy Lewis any interest in any of the accounts?
MR. REGA: Objection. This entire line of questioning is leading.
MR. CHRISTIAN: May I hear the question read back, please.
(The last question was read back as follows: "Did you ever offer Mr. Andy Lewis any interest in any of the accounts?")
Q. (BY MR. CHRISTIAN) Mr. Ouimette, did you ever

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say anything to Mr. Lewis about any interest in U21, E11 or E14?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) What, if anything, did you say to Mr. Lewis about any interest he might have or claim to have or did have in U21, E11 or E14?
A. Never had a conversation like that with Mr. Lewis.
Q. Did you ever have a conversation with Mr. Friedberg in which the concept of giving Andy Lewis an interest in any of these accounts was raised?
MR. REGA: Objection; leading.
A. No.
MR. CHRISTIAN: May I hear the question again, please.
(The last question was read back as follows: "Did you ever have a conversation with Mr. Friedberg in which the concept of giving Andy Lewis an interest in any of these accounts was raised?")
Q. (BY MR. CHRISTIAN) Have you ever discussed with Mr. Friedberg the concept of Mr. Lewis having an interest in any of these accounts?
MR. REGA: Objection.
A. No.

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MR. CHRISTIAN: Nature of the objection?
MR. REGA: Leading. Every one of these questions are leading, Doug.
MR. CHRISTIAN: Not a single one is leading, Pat.
MR. REGA: They are all leading.
MR. CHRISTIAN: Let's move on.
MR. REGA: And the form of the questions are improper and you know they are.
MR. CHRISTIAN: They are absolutely not. Can't be any more neutral in the asking of that question than I was.
MR. REGA: You can ask the witness what he recalls about either documents that you provided to him or a particular subject matter.
MR. CHRISTIAN: Mr. Rega, I really do not want a lecture from you on the record or off the record about how to take a deposition. May I move on?
MR. REGA: My intention was not to give you a lecture, and if it appeared that way, I apologize. My intention was to respond to your question as to why I'm raising objections to the line of leading questions you are asking. You may continue.
MR. CHRISTIAN: Thank you, sir.
Q. (BY MR. CHRISTIAN) Did Mr. Friedberg at any

time tell you that he offered an interest in any of these accounts to Mr. Lewis?
MR. REGA: Objection.
A. No.
Q. (BY MR. CHRISTIAN) Have you seen any document that leads you to believe that Mr. Lewis was ever offered any interest -- strike that.
To your knowledge, did Mr. Lewis ever turn down any offer of an interest in any of these accounts?
MR. REGA: Objection.
A. I don't know.
Q. (BY MR. CHRISTIAN) Mr. Gentile in Exhibit 36 references the concept of staying under the radar. Do you see that?
A. I do.
Q. Do you have any idea what he was referring to there?
A. I don't.
Q. Did you ever have occasion to consider whether Mr. Lewis was adequately compensated?
A. I'm sorry. Say that again.
Q. Did you ever have occasion to consider whether Mr. Lewis was adequately compensated?
A. No.
Q. That thought never occurred to you?

A. No.
Q. Did you ever have a discussion with Mr. Friedberg about the tax treatment of any of the funds relating to these accounts?
A. I don't recall.
Q. Exhibit 49 is a March 4, 1999 letter from Cathryn Towlson at Mutual to you -- I'm sorry -- to Mr. Gitter copied to you. Would you look at that, please.
(Deposition Exhibit 49 was marked.)
Q. Mr. Ouimette, is this a letter that was copied to you at Research Underwriters?
A. It would appear so, yes.
Q. Do you see that it's a letter that confirms guidelines for E11 and E14?
A. Yes.
Q. Did you ever have any conversations with Mr. Gitter about any of these accounts?
A. No.
Q. Do you know whether either you or Mr. Friedberg issued written guidelines -- well, strike that.
Did you ever issue written guidelines with regard to any of these accounts?
A. No.

Q. Do you know whether Mr. Friedberg did?
A. I don't.
Q. Exhibit 50 is a letter and some documents relating to the opening of an account at Legg Mason Wood Walker bearing Bates numbers Mutual 3136 to 3140.
(Deposition Exhibit 50 was marked.)
Q. Mr. Ouimette, Exhibit 50, as I indicated, is a January 16, 1995 letter from David Alexander, one of the Mutual companies, to a person at the Legg Mason with some additional documents included in the exhibit; is that fair?
A. Yes.
Q. You were copied on that?
A. Yes.
Q. At least the letter?
A. Yes.
Q. If you see -- if you look on the second page of the exhibit, Certificate of Foreign Status, under "Name of owner Mutual Indemnity Limited," do you see that?
A. Yes.
Q. Was Mutual Indemnity Limited the owner of that account?
MR. REGA: Objection as to form and leading.
A. It says Mutual Indemnity Series E11.

Q. (BY MR. CHRISTIAN) Was it your understanding that Mutual Indemnity, one of the Mutual companies, was the owner of this account that was being opened?
MR. REGA: Objection; leading and as to form.
MR. CHRISTIAN: Okay. I will withdraw it.
Q. (BY MR. CHRISTIAN) Look at 3139, Mutual 3139 in that exhibit. The Bates number I'm talking about. The little number at the bottom.
A. Okay.
Q. Is this a document you have ever seen before?
A. I don't know. I don't recall.
Q. Would you agree with me, sir, that 3139 that you are looking at is referenced in a letter that was copied to you, i.e., the first page of this exhibit?
MR. REGA: Objection.
Q. (BY MR. CHRISTIAN) Do you see the letter, it refers to a Corporate Account Agreement (Cash)? Do you see that. Item No. 3 in the letter.
A. Yes.
Q. Then Mutual 003139 is a Corporate Account Agreement (Cash). Is that what it appears to be?
A. Yes, that's what it appears to be.
Q. Now, the authorized signatures or signatories on this account were Mr. Watson, Mr. Alexander, Mr. Kelly, and Mr. Mulderig; is that correct?

more of these -- strike that.
Were dividends ever declared relating to one or more of these accounts?
MR. REGA: Objection.
A. Per this document, yes.
Q. (BY MR. CHRISTIAN) Is this document an example of a dividend that was declared?
MR. REGA: Objection; leading and as to form.
A. I don't know what you mean by "example."
Q. (BY MR. CHRISTIAN) Does this document indicate to you that a dividend was declared?
A. Well, it indicates that --
MR. REGA: Objection.
A. It indicates that I received a dividend.
MR. REGA: Objection; leading as to form.
Q. (BY MR. CHRISTIAN) You received other dividends -- strike that.
Did you receive other dividends relating to any of the three accounts at issue over the years?
A. No.
Q. Do you know whether dividends were declared in your favor relating to any of these accounts over the years other than with regard to the document we just looked at?
MR. REGA: Objection as to form.

A. Not to my recollection.
Q. (BY MR. CHRISTIAN) Now, let's go back to Exhibit 40, which is in the Andy Lewis set of exhibits. Now, you may recall an earlier spreadsheet that indicated a 50 percent split for U21. Do you recall looking at that a few minutes ago?
A. Yes.
Q. On this spreadsheet there is a 33 percent split for U21. Do you see that?
MR. REGA: Objection as to form and leading.
Q. (BY MR. CHRISTIAN) Mr. Ouimette, do you see the reference to U21? Do you see the U21 column?
A. Yes.
Q. Do you see the "Split" line?
A. I do.
Q. What is the percentage set forth on the "Split" line under the U21 column?
A. It says 33 percent.
Q. Was there ever -- strike that.
Did you ever discuss with Mr. Friedberg -- well, strike that as well.
Did anyone other than you and Mr. Friedberg have an interest in U21?
A. No.
Q. Do you know, sir, why 33 percent is on the

"Split" line in the U21 column?
A. I don't.
Q. Do you know whether Mr. Rega ever indicated to anyone that Mr. Lewis had an interest or an alleged interest in U21?
MR. REGA: Objection.
A. I don't.
Q. (BY MR. CHRISTIAN) Did you have any involvement in any of the lawsuits brought by Mr. Friedberg in Bermuda relating to any of these accounts?
A. No.
Q. Do you bear any ill will toward Mr. Friedberg?
A. No.
Q. Do you have any bias against Mr. Friedberg in terms of your coming in and giving deposition testimony?
MR. REGA: Objection.
A. No.
MR. CHRISTIAN: Mr. Ouimette, I thank you for coming in and answering my questions. I think Mr. Rega has some questions for you. I may have some follow-up questions, but for now I'll pass the witness to Mr. Rega.
MR. REGA: If it's acceptable to you and Mr. Christian, I would like to take a short break. Not

to delay this, but maybe five or ten minutes.
MR. CHRISTIAN: Sure.
THE VIDEOGRAPHER: Off the record. End of tape 1 at 11:36.
(Recess taken.)
THE VIDEOGRAPHER: On the record. Start tape 2, September 8, 2005, Mark Ouimette at 11:41.
MR. REGA: I have no questions for Mr. Ouimette and would also like to thank him for taking time out of his day to come and appear here this morning.
MR. CHRISTIAN: Let's go off the video record then.
THE VIDEOGRAPHER: Off the record at 11:42.
(Pause in proceedings.)
THE VIDEOGRAPHER: On the record at 11:44.
Q. (BY MR. CHRISTIAN) Mr. Ouimette, did Mr. Friedberg ever tell you that it was his belief that he could have all of the funds in U21, E14 or E11 by simply asking for the money from Mutual?
MR. REGA: Objection as to form and leading.
A. I'm not sure what you are --
Q. (BY MR. CHRISTIAN) Did Mr. Friedberg ever say to you that it was his belief that he could have all of the money in the accounts relating to U21, E14, and E11

EXHIBIT B

COPY OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN M. FRIEDBERG,
Plaintiff

V

NO. 02-CV-3193

MUTUAL HOLDINGS, LTD., et al.,
Defendants

Oral deposition of ANDREW A. LEWIS, taken at the law offices of BALLARD SPAHR ANDREWS & INGERSOLL, L.L.P., 1735 Market Street, 51st Floor, Philadelphia, Pennsylvania, on Wednesday, August 24, 2005, commencing at approximately 9:34 a.m., before Barbara McKeon Quinn, a Registered Merit Reporter, pursuant to notice.

Mr. Ouimette's share of the allocation.

Q. Used by whom?

A. I don't think he said by whom.

Q. Did you have an understanding of who used it?

A. I had assumed it was Mr. Friedberg.

Q. What other conversation did you have with Mr. Rega last night about Mr. Gentile or the letter or U-21 or our inquiry?

A. He asked was this a surprise and a common kind of occurrence, and I said no, it was not a surprise and no, it's not a common occurrence. Mark and Steve had, within the U-21 structure, offered me ownership in that, they had offered me ownership in other things, and a number of other clients had offered me ownership as well.

My comment to Mr. Rega was

that that was something that I had routinely said no, thank you, but it was also evidence of the job that I did as a salesman for -- on their programs and for MRM.

Q. What else was discussed last night with Mr. Rega or anyone else involving Mr. Gentile or the letter or U-21 or our inquiries regarding the letter?

MS. SMITH: Objection as to form.

THE WITNESS: What was that last part of that question?

BY MR. CHRISTIAN:

Q. Our inquiry regarding the letter.

A. There was nothing mentioned on the inquiry. I'm not sure I understand that aspect of it.

With the U-21 program, and the offer of the ownership, it was believed by Mr. Friedberg and Mr. Ouimette that during the course

of our relationship that -- that they had a disproportionate benefit of our relationship; that I did a lot of work and did not get compensated fairly.

And my comment to them and to Mr. Rega last night was that that was just evidence of a good sales job and that's how we were trained to do it. So I told him that I had no ownership; it was repeatedly offered; I had been offered a number of things from Mr. Friedberg and Mr. Ouimette over the years, from vacations, from a Ferrari, numerous other types of gifts, vacations, wines.

I have not accepted anything from Mr. Friedberg except for a hundred dollar bill once in Bermuda, which went to a bar tab, and then a pair of I'll say Head skis without bindings, which I gave to my sister.

Q. What other conversation did

of me, no.

Q. Have you ever prepared such a document?

A. No.

Q. Do you have any idea what account statements Mr. Gentile is referring to in the second line of this letter?

A. No. It says See U-21.

Q. Did you ever claim to have an interest in the proceeds in U-21?

A. No.

Q. Did you ever tell anyone you had an interest in any of the proceeds, in any of the accounts at issue in this lawsuit?

A. No.

Q. Do you believe you ever had such an interest?

A. No.

Q. Did you ever have a discussion with regard to your responsibility or potential responsibility for a portion of a

$1.8 million claim made by Mutual or any of the Mutual companies?

A. I'm sorry. Can you repeat that question?

MR. CHRISTIAN: Would you read the question back, please.

(The reporter read back the following testimony:

"Q Did you ever have a discussion with regard to your responsibility or potential responsibility for a portion of a $1.8 million claim made by Mutual or any of the Mutual companies?")

THE WITNESS: No.

BY MR. CHRISTIAN:

Q. Have you ever discussed the subject matter of this letter with Mr. Friedberg?

A. Mr. Friedberg repeatedly offered me a participation in U-21.

Q. Why?

A. Because -- there's two answers. One, that is the type of

person he is. He shares, he gives the shirt off his back. Two, he felt I was undercompensated and that I was due. I said thank you, but no, thank you.

Q. How much of an interest did he propose that you have?

A. I'll say a third.

Q. Did you ever have a discussion with Mr. Ouimette about any such proposed interest?

A. Mr. Friedberg and Mr. Ouimette both made the offer and I said no to both.

Q. And did you ever share your compensation information with Mr. Friedberg, how much money you made?

A. In total or relating to his programs?

Q. Either one.

A. In total, no.

Q. Relating to his programs?

A. I told him how we got

Mr. Friedberg and/or his counsel in the prosecution of the claim in Bermuda; is that correct?

A. That is correct.

Q. Have you been paid for any of that?

A. For the very first time last night I got a dinner, and that is the extent to which I've been paid.

Q. You have flown to Bermuda on Mr. Friedberg's behalf with regard to this litigation; is that correct?

A. I have flown to Bermuda and met on behalf of Mr. Friedberg while I was doing other business down there. I did not make a specific trip for the sole purpose of that.

Q. Well, did you make any trips to Bermuda for the primary purpose of helping Mr. Friedberg in this matter?

A. After what date?

Q. After you started at

Keystone Risk.

A. No.

Q. How many trips did you make to Bermuda for the purpose of discussing this dispute or the Bermuda dispute?

MS. SMITH: Objection as to form.

BY MR. CHRISTIAN:

Q. How many times that you traveled to Bermuda did you do anything relating to either this dispute or the Bermuda dispute?

A. I will give you a generalization. I generally go to Bermuda once a quarter. While I'm in Bermuda I generally meet with Mutual Indemnity, and we almost always speak at some point on this. So I would say probably seven; six, seven, something like that.

Q. Just to back up on the collateral review, there was never an automatic release of funds; correct?

The funds were only released pursuant to a collateral review and approval by someone in Bermuda; is that correct?

A. There were certain Mutual Indemnity programs that had tax liabilities that Mutual had to pay tax and/or the customer had to pay tax, and I believe those were automatically generated.

Q. Those were not these accounts, though; correct?

A. Those were not these accounts.

Q. All right. With regard to any of the expenses you have incurred since you started at Keystone Risk relating to this dispute or the Bermuda dispute, or with regard to any of the time you have spent assisting Mr. Friedberg, have you been paid or reimbursed?

MS. SMITH: Objection as to form.

THE WITNESS: No.

BY MR. CHRISTIAN:

Q. Do you have an expectation that you'll be paid or reimbursed?

A. No.

Q. Have you had any discussion with Mr. Friedberg or any of his lawyers with regard to whether you would be paid or reimbursed?

A. No.

Yes, actually. There was discussions and I said that I have not been paid. I do not intend to be paid and I do this for all of my existing customers, agents, brokers as well as Legion and Mutual.

Q. You're not assisting any of the defendants in their defense of this case, are you, sir?

MS. SMITH: Objection as to form.

THE WITNESS: I made an offer to them that I will help them in any way, shape or form and they

have elected to not take me up on that offer.

BY MR. CHRISTIAN:

Q. Who did you make that offer to?

A. To Mr. Pickering, Mr. Alexander, Mr. Reardon.

Q. I'm going to show you Exhibit 18, previously marked. It's a shareholders agreement, and I'm going to refer you to Page 7. You can look at the agreement if you want, but I'm just going to ask you about that last page.

A. Okay.

Q. There are some signatures on that page.

A. Yes.

Q. Do you see where it says it was signed in Hamilton, Bermuda?

A. Yes.

Q. Is it your recollection that those gentlemen were in Bermuda when that agreement was signed?

LEXSEE 2000 U.S. DIST. LEXIS 1409

PEERLESS HEATER COMPANY and, PEERLESS INDUSTRIES, INC., Plaintiffs, VS. MESTEK, INC., JOHN E. REED, and R. BRUCE DEWEY, Defendants.

CIVIL ACTION NO. 98-6532

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2000 U.S. Dist. LEXIS 1409; 46 Fed. R. Serv. 3d (Callaghan) 553

February 7, 2000, Decided
February 7, 2000, Filed

DISPOSITION: [*1] Court declined to grant plaintiffs' leave to depose Mr. Hittinger. Request DENIED.

LexisNexis(R) Headnotes

COUNSEL: For PEERLESS HEATER COMPANY, PEERLESS INDUSTRIES, INC., PLAINTIFFS: CARL W. HITTINGER, NEIL C. SCHUR, STEVENS AND LEE, P.C., PHILADELPHIA, PA USA.

For MESTEK, INC., JOHN E. REED, R. BRUCE DEWEY, DEFENDANTS: LARRY H. SPECTOR, MANN, UNGAR, SPECTOR, LABOVITZ, P.C., PHILA, PA USA.

JUDGES: CHARLES B. SMITH, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: CHARLES B. SMITH

OPINION:

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

At issue in the above-referenced action is a request by defendants Mestek, Inc. ("Mestek"), John E. Reed, and R. Bruce Dewey to depose Carl Hittinger, trial counsel for plaintiffs Peerless Heater Company and Peerless Industries, Inc. ("Peerless"). Plaintiffs vehemently oppose this request and accuse defendants of simply trying to disqualify their counsel. Upon review of the various submissions by the parties, the Court finds that (1) defendants can obtain the needed information in a less intrusive means and (2) the hardship exacted on plaintiffs by permitting the deposition of their counsel clearly outweighs any benefit to defendants. As such, the Court will deny [*2] defendants' request for leave to depose Mr. Hittinger.

I. FACTUAL BACKGROUND

In October of 1992, Peerless Industries, Inc. and Mestek, Inc. entered into an Investment Agreement, which provided that the two companies would become co-owners of Eafco, Inc., previously a Peerless subsidiary operating a foundry in Boyertown, Pennsylvania. Mestek was to put capital into the foundry so that it could supply both companies with all of the cast iron sections they needed for their boilers.

A dispute arose between the parties, in March, 1998, over the interpretation of the Investment Agreement. Mestek subsequently sued Peerless, complaining that Peerless had breached the Agreement by buying castings from a foundry other than Eafco. In April, 1998, Peerless, acting through counsel Carl Hittinger responded by instituting two separate lawsuits against Mestek - one in equity and one in law. In an effort to glean the legal claims behind these lawsuits, Mestek, represented by Larry Spector, served Mr. Hittinger with praecipes for rules that complaints be filed on both the Summons in Law and the Summons in Equity. On May 14, 1998, Peerless filed a pleading only in its equity action asking the [*3] Court to declare that, under the terms of the Peerless/Mestek Investment Agreement, Peerless was not bound to purchase all of its cast iron products exclusively from Eafco. No complaint was ever filed for the Summons in Law.

During the course of these events, another problem simmered between the two companies. In May of 1995, prior to the filing of the lawsuits, Peerless received information that a Mestek representative was making some disparaging remarks as to Peerless' financial status. In response to this information, Peerless circulated a "To whom it may concern" memorandum to clients denying

any rumors that Peerless was for sale or that its financial situation was precarious. Even after Peerless distributed this memo, however, it remained concerned that Mestek continued making negative statements about Peerless in the marketplace. As such, Robert Fish, the president of Peerless, asked his Vice President for Sales, Peter Morgan, to prepare a memo summarizing all the alleged remarks by Mestek that he had heard over the years. On May 12, 1998, Morgan sent Fish a fax describing for him "some specific examples of how our business and reputation has, in many cases, suffered these past [*4] five years with all of the false and erroneous comments made by those connected with the Smith and Mestek organization."

In June of 1998, Peerless chose not to pursue whatever claim was underlying the Summons in Law and, instead, entered into a stipulation for dismissal without prejudice. By October of 1998, the parties agreed to an effective "divorce." Pursuant to a settlement agreement containing mutual releases, Mestek was to purchase Peerless' interest in the foundry n1 and Peerless agreed to buy its castings from the foundry. Independent of the contractual releases, Peerless also consented to dismiss with prejudice the litigation previously instituted by the Summons in Law.

n1 At the January 31, 2000 oral argument in this matter, Mestek's counsel represented that Mestek paid Peerless an amount in the vicinity of $9 million.

Six weeks later, Peerless filed this litigation based on the same "bad mouthing" allegations which had been the subject of its 1995 "To whom it may concern" memo, as well as many of [*5] the statements summarized in Pete Morgan's May 12, 1998 memo. Defendants promptly argued that the April 1998 Summons in Law, separate from the equity action which sought declaratory relief, stemmed from the same alleged defamatory statements challenged in the instant complaint. As such, those claims were now barred by *res judicata*, due to the October 1998 dismissal with prejudice. Plaintiffs responded that the Summons in Law had nothing to do with the claims set forth in the complaint currently at bar.

Defendants now seek to depose Mr. Carl Hittinger, as counsel for plaintiffs at the time the Summonses were filed, to determine the underlying basis of the Summons in Law.

II DISCUSSION

Under Federal Rule of Civil Procedure 26(b)(1), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." Although the attorney-client privilege and/or the work-product doctrine may provide grounds for refusal to answer some or all of the questions, "the fact that the proposed deponent is an attorney, or even an attorney for a party to the suit, is not an absolute bar to taking his or her deposition." 8A CHARLES [*6] A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2102 (West 1994). n2 No special privilege or immunity shields an attorney of record. Walker v. United Parcel Services, 87 F.R.D. 360, 361 (E.D. Pa. 1980). Indeed, "if the attorney possesses relevant, non-privileged information, that information ought to be discoverable just as it would be if possessed by a party or a non-party." Arias v. Philadelphia, 1998 U.S. Dist. LEXIS 10066, Civ. A. No. 97-6641, 1998 WL 398252, *1 (E.D. Pa. June 23, 1998).

n2 Plaintiffs argue that because Mr. Hittinger will have no non-privileged information about which to testify, the Court should preclude his deposition. Specifically, they contend that defendants seek to depose Mr. Hittinger about his client communications regarding the reasons for filing the Summons in Law in 1998 and his own legal strategy at that time. Such subjects are protected under both the work product doctrine and the attorney-client privilege.

It is true that "since questions to an attorney may give rise to objections based on work product doctrine and the attorney-client privilege, a request to depose opposing counsel is generally viewed with disfavor . . ." Moore's Federal Practice, § 30.03 (Matthew Bender & Co., Inc. 1999). However, questions of attorney-client privilege and work-product privilege should be resolved at a deposition rather than in the abstract in advance. Jamison v. Miracle Mile Rambler, Inc., 536 F.2d 560, 565-66 (3d Cir. 1976); Musko v. McCandless, 1995 U.S. Dist. LEXIS 14477, Civ. A. No. 94-3938, 1995 WL 580275, *1 (E.D. Pa. Sept. 29, 1995) but see Walker v. United Parcel Services, 87 F.R.D. 360, 362 (E.D. Pa. 1980)(short of prohibiting plaintiffs' deposition of defense counsel, there is no way to protect the attorney's mental impressions, opinion, legal theories or litigation strategy). The sheer fact that Mr. Hittinger's answers to the deposition questions may be privileged does not, in and of itself, prohibit the deposition.

[*7]

However, "such a deposition provides a unique opportunity for harassment, it disrupts the opposing attorney's preparation for trial, and could ultimately lead to disqualification of opposing counsel if the attorney is called as a trial witness." Slater v. Liberty Mut. Ins. Co., 1999 U.S. Dist. LEXIS 275, Civ. A. No. 98-1711, 1999 WL 46580, *1 (E.D. Pa. Jan. 14, 1999) (quoting Marco Island Partners v. Oak Development Corp., 117 F.R.D. 418, 420 (N.D. Ill. 1987); see also Musko v. McCandless, 1995 U.S. Dist. LEXIS 14477, 1995 WL 580275, *1 (E.D. Pa. Sept. 29, 1995) ("deposition of an attorney can often be burdensome and disruptive, and is not to be entered into unadvisedly or lightly."). Therefore, it is fairly well-established in this district that a party should not be permitted to take the deposition of the opposing party's attorney "unless he can show that the information sought is relevant, non-privileged and critical to the preparation of the case and that there is no other way to obtain the information." Slater, 1999 WL 46580 at *1; see also Lebovic v. Nigro, 1997 U.S. Dist. LEXIS 1897, Civ. A. No. 96-319, 1997 WL 83735, *1 (E.D. Pa. Feb. 26, 1997) (deposition of opposing counsel [*8] is "typically only permitted where a clear need is shown").

To determine whether an attorney of record may be deposed, the courts in the Eastern District of Pennsylvania have adopted three factors to guide their decisions: "(1) The extent to which the proposed deposition promises to focus on central factual issues, rather than peripheral concerns; (2) the availability of the information from other sources, viewed with an eye toward avoiding cumulative or duplicative discovery; and (3) the harm to the party's representational rights resulting from the attorney's deposition." Frazier v. Southeastern Pennsylvania Transportation Authority, 161 F.R.D. 309, 313 (E.D. Pa. 1995); Arias, 1998 WL 398252, at *2. Analyzing the case at bar under these three factors, this Court finds that defendants should not be permitted to depose Carl Hittinger.

A. The Extent to which the Proposed Deposition Promises to Focus on Central Factual Issues, Rather than Peripheral Concerns.

Turning to the first factor, plaintiffs argue that the proposed deposition of Mr. Hittinger would focus on peripheral concerns rather than central factual issues. The instant complaint states [*9] claims for violations of the Sherman Act, the Clayton Act and the Lanham Act, as well as claim for defamation, tortious interference, trade libel and violation of the Massachusetts Unfair Sales Act. Because Mr. Hittinger allegedly knows no facts relevant to such claims, plaintiffs contend that his deposition is outside the scope of this litigation and, as such, impermissible.

Quite to the contrary, however, Defendants' claim of *res judicata* is more than just a boilerplate defense. Indeed, it goes to the very heart of this case and queries whether the allegations that were to be the subject of litigation instituted through the filing of the Summons in Law, later dismissed with prejudice following a substantial payment by Mestek to Peerless, were the same as those underlying four of the six counts of this lawsuit. If the evidence yields an affirmative answer to that question, then defendants may persuasively argue for dismissal of those counts. As the issue is far from peripheral to this lawsuit's central concerns and since Mr. Hittinger, as counsel for Peerless during the filing of the Summons in Law, would have information on this crucial issue, the first factor tilts the scales [*10] in favor of defendants' position.

B. The Availability of the Information from Other Sources, Viewed with an Eye Toward Avoiding Cumulative or Duplicative Discovery.

Defendants' argument falters, however, when, under the second factor, they claim that Mr. Hittinger is the sole source of knowledge available on the reasons underlying the filing of the Summons in Law. Defendants allege that neither Robert Fish, who authorized the filing of the Summons in Law, or Gene Fish, the President of Peerless Industries, could clearly testify as to why the Summons in Law was filed. Moreover, defendants contend that plaintiffs have refused to produce the bills from Ballard Spahr, Mr. Hittinger's law firm at the time the Summons in Law was filed, thereby precluding defendants from taking a closer look into the reasons behind that filing. These facts, according to defendants, leave Mr. Hittinger as the only individual with knowledge of the reason for filing of the Summons in Law and what the claims underlying that action were.

Such an argument, however, mischaracterizes the record to some extent. A thorough review of the deposition testimony provided by the parties reveals not only that defendants [*11] already have substantial information regarding the reasons behind the Writ of Summons in Law, but also that they have several other means of obtaining additional information on the subject.

1. The Already-Existing Evidence

As noted above, both plaintiffs and defendants deposed Robert Fish and Eugene Fish. In turn, both men testified extensively as to this very issue, repeatedly explaining, without qualification, the reasons for filing the Writ of Summons in Law:

(a) Deposition Testimony of Robert Fish

Q. [by Mr. Hittinger] Now, at the time that you had your attorneys file these Writ of Summons in Law and Writ of Summons in Equity, what legal dispute were you contemplating be resolved by those filings, what issue?

[by Mr. Spector] I'm going to object. I don't think it's — I don't think the witness made it clear, but I think it's clear from the documents that these are two separate lawsuits. And I think that questioning should — I object to the form of the question.

***

A. I wanted to have the right to get my iron made where we felt it was best for Peerless Heater Company. Mestek clearly didn't have that position. We needed to make a determination [*12] as soon as we could, and our attorney's advice was that in filing this, it might be a faster path to having a trial or some decision where we could find the outcome.

***

Q. Now, at the time that either of the Writs of Summons were filed or the Complaint was filed that I've just shown you, had you made any determination as to whether or not at that time you were going to, you being the president of Peerless Heater Company, were going to sue Mestek for any antitrust violations?

A. Absolutely not.

Q. Did the Writs that we looked at before which were brought on behalf of both Peerless Heater and Peerless Industries contemplate in any way that Peerless Heater was thinking about filing an antitrust action against the individuals named in the Berks County Common Pleas Court?

A. No. That was all about a foundry, plain and simple.

Deposition of Robert Fish, at pp. 21–29.

—

Q. [by Mr. Hittinger] Okay. Now, your recall at the time that that was resolved there were certain pending lawsuits that were dismissed as part of that settlement? Do you remember that?

A. Right.

* * *

Q. Were — did you contemplate or intend that by signing that you were [*13] releasing your rights against Mestek and its officers for any antitrust violations that they had committed?

A. No. Neither side was releasing anything other than the foundry issues. It was a very specific document.

Deposition of Robert Fish, at pp. 38–40.

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Q. [by Mr. Spector] Is it fair to say that it was only after Mestek had sued Peerless and you and your father, that under those circumstances, Peerless first considering — first considered suing Mestek for the bad-mouthing that had gone — allegedly gone on?

A. Absolutely not. Absolutely not. Mestek in my opinion was threatening my ability to get iron. If I didn't have that, I was out of business. And that was the whole purpose of writing it. Nothing to do with anything else. That's what it says. That's what it was. That's a scary thing when that's what you sell.

Q. When did you first consider suing Mestek for defamation?

A. For defamation? None of the other things? I don't think we — I would know what was even suable until we talked with Carl [Hittinger] in June of '98 I think it was.

* * *

Q. Did you discuss with anyone the need for Peerless to take some action by filing some legal [*14] document to protect its right for statute of limitations purposes to sue Mestek for defamation?

A. Never.

Deposition of Robert Fish, at pp. 336–338.

—

Q. [by Mr. Spector] My question to you is, what was the purpose of the filing of [the Writ of Summons in law]?

* * *

A. I don't know all the fancy lawyer stuff. All I know is that I was worried about being able to buy iron. And I wanted the right to go to other people if Mestek shut me off, and I wanted that right away, as fast as possible.

* * *

Q. Do you believe — do you have any knowledge as to why the Summons in Law, RF–3, was filed?

[by Mr. Hittinger] He just answered that. How many time do you want to hear the answer? Give it to him again.

A. It's the same thing. All I know, I'm not a lawyer, I saw the Mestek suit, I said, oh, my God, I have to be able to get iron.

Q. And weren't you angry then about all the bad-mouthing or all the derogatory statements that you recalled having been made about Peerless by Mestek?

A. I was far too busy trying to settle everything else. No. It wasn't really on my mind.

* * *

Q. The question is, in April of '98, did you discuss [*15] with [Mr. Hittinger] the possibility of Peerless filing a defamation action?

A. We didn't discuss anything with [Mr. Hittinger] until June [of 1998] at my father's house when this crap didn't stop and everything just kept going on and on and on. And, you know, you talk to the people that run the company. If they don't do anything, what are you supposed to do?

Deposition of Robert Fish, at pp. 349–353.

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Q. [by Mr. Spector] Had you had any discussions with Mr. Hittinger or anyone at the Ballard firm about the allegedly defamatory statements that had been made by Mestek about Peerless at any time before the filing of the Summons in Law on April 6th, 1998?

[by Mr. Hittinger] I'll let you answer that question.

* * *

A. Not that I recall.

Deposition of Robert Fish, at pp. 364–365.

—

Q. [by Mr. Spector] Now, when — when you — you signed a settlement agreement that we've marked D–8 in late October 1998, correct? Now, at that time you intended to bring a lawsuit against Mestek for defamation, correct?

* * *

A. No. No. You're saying intended. I'm saying we started thinking about it in June. I decided to file the lawsuit [*16] after all that was done and the rumors kept continuing. I think earlier I testified as to two specific instances after we signed where this behavior continued.

Q. Okay. And those were, one, an instance in Chicago that took place actually after you filed the Complaint, correct?

A. Yes.

Q. And the other was with regard to Emco in Nova Scotia?

A. Yes.

Q. And when did that situation take place?

A. They were both after we signed that agreement. The specifics Pete Morgan

would have.

Q. That is between late October and the time this litigation was filed, which I believe was December 16th?

A. All I know is it happened after we signed.

Deposition of Robert Fish, at pp. 378–379.

—

Q. [by Mr. Spector] Take out RF–8 please. RF–8 appears to be a memo from Peter Morgan to you and it's dated May 12th, 1998. What were the circumstances that led to Mr. Morgan giving you this memo?

A. You'd have to ask him.

Q. Did you ask for it?

A. My recollection is that he would mention something, you know, one of the instances of trouble, and at some point I said, you known, write down a memo to me, and I think that's how it happened. But [*17] I don't have a real clear recollection.

Q. Well, why did you ask him to write it down to you?

A. Because he kept calling me with little pieces of information or somebody said this. And I said, look, make up a summary and, you know, let's look at the whole thing.

Q. And why did you want to have him make up a summary? What was the point?

A. I often ask for summaries of things because I don't have time to read all the lines of everything.

Q. Well, isn't it true you wanted a summary so that you could consider bringing litigation — or strike that. Wasn't it true that you wanted a summary so that you could flesh out the Summons in Law, RF–3, into a full–blown Complaint for defamation against Peerless.

A. Absolutely not. Defamation never came up.

Q. How about using allegedly derogatory remarks made by Mestek about Peerless as the basis for an antitrust suit, had that come up at any time before April 6th, 1998.

A. No, it did not.

Deposition of Robert Fish, at pp. 366–368.

(b) Deposition Testimony of Eugene Fish

Q. [by Mr. Hittinger] An let me show what has been marked previously as RF–3 and RF–4. RF–3 is a Summons in Law filed [*18] by Peerless Industries, Peerless Heater, Eugene Fish, Robert Fish against Mestek and various individuals in Berks County. It was filed April 6, '98. And also a document, RF–4, which is a Summons in Equity, filed the same date, against the same people. Have you seen these two documents before?

A. Yes, I have.

Q. Did you authorize them to be filed on behalf of yourself and Peerless Industries?

A. Yes, I did.

Q. And can you tell use why you asked your attorneys to file them?

A. I was so angry when I received the original Complaint that I didn't read it. But eventually I read portions of it. I consulted with some of my friends in the Berks County area, and I was told that the judge that was assigned to this particular case took his good old time to decide cases and if we wanted any action, we better file our own case, and that's what we did.

Q. Okay. Now let me show you what's been marked as RF–5. And this is a Complaint filed by Peerless Industries against Mestek, and it was filed May, 14th, 1998. Have you seen that document before.

A. Yes, I have.

Q. And is that an action that you authorized

be filed on behalf of Peerless?

A. Yes, I did.

* [*19] * * [long description by Eugene Fish as to why it was filed]

Q. And the purpose of the suit, then, was to have the court declare the rights of the parties as to whether castings had to be — have to be purchased from Eafco or not?

A. Absolutely.

Q. Now, did this Complaint, or these writs that I showed you, have anything to do with an anti-trust action against Mestek or its officers?

* * *

A. Absolutely not.

Deposition of Eugene Fish at pp. 9-13.

—

Q. [by Mr. Hittinger] Now, the action that was filed in Berks County, the writs that were filed in April of '98, at that time those were filed, were you contemplating filing an anti-trust action, possibly, against Mestek or any of its individuals?

[by Mr. Spector] Objection.

A. Absolutely not.

Q. Did you authorize your lawyers at that time, in April of '98, to do any research or investigation as to whether or not Mestek and its officers had violated the anti-trust laws or the Lanham Act or engaged in defamation in any way?

A. I did not. We didn't have enough information at that time. At least I didn't have enough information at that time.

Q. So what was your purpose in [*20] telling your lawyers to file these Writs of Summons in Berks County, what rights were you trying to protect on behalf of Peerless Industries?

* * *

A. That was for the purpose of permitting Peerless to continue to do business, both to have a place to buy their castings and to sell them.

Q. Okay. Now, what Mr. Spector did not ask you was why, in these Writs of Summons that were filed, you not only named Mestek at a potential defendant but named various individuals as defendants. My question is, why did you authorize your lawyers to name those individuals in these writs that were filed in April of '98; what were you thinking?

A. Well, I would say we did it for two reasons. First, we didn't know exactly who was responsible there. And secondly, we wanted to make sure everybody that might have — possibly have anything to do with it was being sued.

Q. When you say responsible and have something to do with it, what are you referring to, what's the issue you're referring to?

A. Well, as far as the agreement was concerned, we — I don't want to get involved with each one of the individuals.

Q. You mean him, right.

A. But somebody there obviously was [*21] trying to say that we couldn't buy boilers somewhere else. And as I pointed out before, they had done it, they had bought boilers from Burnham, that was all right. But when we had talked about the possibility of getting boilers on the outside they objected to it.

Deposition of Eugene Fish, at pp. 123-126. n3

n3 Defendants cite to the following exchange as proof that Eugene Fish was not able to address the issue:

> Q. [by Mr. Spector] Now, there was — let's refer back to RF-3. This separate action. It started through the filing of this document called Summons

> in Law. Now, did you have an understanding as to what that action was about?
>
> A. I had no — when I turned this over to the attorneys, that's their job not mine.
>
> * * *
>
> Q. Is it fair to say that if anyone would know the answer to the question as to why the Summons in Law was filed, it would be your attorney?
>
> A. I can't answer that. I don't know the answer to that.
>
> * * *
>
> Q. Other than yourself, who else was involved in authorizing your attorneys to take any action on behalf of Peerless Industries or Peerless Heater Company against Mestek?
>
> A. I think Bob, my son Bob was involved in that.

Deposition of Eugene Fish, at pp. 91–95. Standing alone, this testimony may have been persuasive. Viewed, however, in conjunction with the other extensive testimony by Eugene and Robert Fish, the Court finds that this one exchange does not meet defendants' burden of proving that it has not already received a satisfactory answer to its questions.

[*22]

In light of this extensive, indeed repetitive, testimony discussing the reasons behind plaintiffs' Summons in Law, the purpose of the May 12, 1998 Peter Morgan memorandum and plaintiffs' first consideration of a defamation-type action against Mestek, defendants are hard-pressed to argue that no witness, other than Mr. Hittinger, can testify on this subject. The simple fact that defendants have not yet received the answer they seek does not give them unfettered access to Mr. Hittinger in order to attempt to force from him more favorable testimony.

2. Alternative Means of Obtaining the Needed Information.

Beyond this substantial testimony already given by the chief decision-makers at Peerless, defendants possess other, less-intrusive means of continuing their discovery on the issue. First, Mr. Hittinger agreed to represent, on the record, whether or not any research was done by anybody at the Ballard firm on what the statute of limitations was for any potential antitrust or defamation claims that Peerless might want to bring against Mestek, so long as Mr. Spector agreed to not seek Mr. Hittinger's disqualification. Mr. Spector declined the offer. See Deposition of Robert Fish [*23] at pp. 355–360.

Second, Mr. Hittinger proposed that Mr. Spector file interrogatories to plaintiffs asking, in plain fashion, what the purpose underlying the Summons in Law was. Again, Mr. Spector refused. See Deposition of Eugene Fish at pp. 101–102.

Third, Mr. Hittinger suggested that Mr. Spector could question Mr. Eugene Fish about all privileged discussions with his attorneys, so long as the privilege was not waived. Mr. Spector would not agree unless Mr. Hittinger produced time sheets and bills n4 from his former law firm showing what work was done on the case. See Deposition of Eugene Fish at pp. 103–105. Mr. Hittinger declined to produce the bills under work-product privilege.

> n4 These bills and timesheets were produced for an *in camera* review by this Court. Having thoroughly read these documents in search of something that would indicate that the Writ of Summons in Law was filed to preserve plaintiffs' defamation, antitrust or Lanham Act claims, this Court finds nothing that would, in any way, support defendants' *res judicata* defense.

[*24]

Fourth, Mr. Hittinger actually agreed to produce the Ballard, Spahr bills if Mr. Spector agreed that no privilege was waived and that no attempt would be made to depose Mr. Hittinger. Mr Spector would not agree to forego Mr. Hittinger's deposition. See Deposition of Eugene Fish, at pp. 98–100.

Finally, defendants could have obtained the deposition of Joel Nied, Esq., the attorney who actually researched, drafted and filed the writs at issue and communicated with the clients about the filing, but who no longer represents plaintiffs in this litigation. They have failed to do so during the entire course of the discovery period.

In sum, despite at least five different, less-intrusive options, defendants have refused to accept anything less than Mr. Hittinger's deposition. The record, however, reveals that Mr. Hittinger's deposition would be duplica-

tive, not only of the significant amount of testimony on the subject that defendants' already have, but also of the additional evidence it can otherwise obtain. To require plaintiffs' trial counsel of record to appear for a deposition and face imminent disqualification from this case, despite defendants' minimal need for the information [*25] he could provide, would not only disrupt the course of this litigation, but would contravene the very discovery principles underlying the Federal Rules of Civil Procedure.

C. The Harm to the Party's Representational Rights Resulting from the Attorney's Deposition.

As a final consideration, plaintiffs clearly face the most severe harm to their representational rights if defendants are permitted to depose Mr. Hittinger. Mr. Spector, defendants' counsel, has repeatedly noted that, if allowed to take Mr. Hittinger's deposition, he will seek to put him on as a witness at trial, thereby necessitating his withdrawal as trial counsel under Pennsylvania Rule of Professional Conduct 3.7. In fact, defendants have made clear that, regardless of Mr. Hittinger's testimony, they will demand his disqualification:

> Mr. Hittinger must be deposed on whether the allegations that were to be subject of the litigation instituted through the filing of the Summon in Law, later dismissed with prejudice, were the same as those underlying four of the six counts of this lawsuit. If upon being deposed, he said that they were or were not, then he must be disqualified either because he will be an adverse [*26] witness to his client or because his credibility will be an issue. Rule Prof. Conduct 3.7(a).

Defendants' Letter Brief, dated January 14, 2000, at p. 5. By virtue of this statement, defendants concede that allowing the deposition will directly result in the incapacitation plaintiffs' counsel on the eve of trial. The Court cannot condone defendants' effort, be it intentional or unintentional, to so undermine plaintiffs' case.

III. CONCLUSION

Considering the three factors in conjunction, it remains clear that, while defendants may have a cognizable defense, they have not shown either that the information is not available from less intrusive sources or that the benefit of the deposition outweighs the significant hardship that would be exacted on plaintiffs. While this ruling does not, in any way, imply that defendants' *res judicata* defense is meritless or that defendants cannot attempt to prove it at trial, it does recognize that defendants cannot disrupt the entire litigation in pursuit of some favorable testimony by plaintiffs' counsel. This Court, therefore, declines to grant plaintiffs' leave to depose Mr. Hittinger. n5

> n5 This litigation has been plagued by countless discovery fights and non-stop bickering between counsel over minute issues. I would remind them that "it is the end that crowns, not the fight" Robert Herrick, The End, Ch. 1, p. 27 (1698).

[*27]

An appropriate order follows.

ORDER - ENTERED: 2-8-00

AND NOW, to wit, this 7TH day of *February*, 2000, upon consideration of the letter briefs submitted by the parties in support of defendants' request for leave to take the deposition of Mr. Carl Hittinger, it is hereby ORDERED, that the request is DENIED.

It is so ORDERED.

BY THE COURT:

CHARLES B. SMITH

UNITED STATES MAGISTRATE JUDGE

LEXSEE 1999 U.S. DIST. LEXIS 275

ERIC SLATER v. LIBERTY MUTUAL INSURANCE CO.

CIVIL ACTION NO. 98-1711

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1999 U.S. Dist. LEXIS 275

January 13, 1999, Decided
January 14, 1999, Filed

DISPOSITION: [*1] Motions to Compel DENIED and Motions for Protective Orders GRANTED.

LexisNexis(R) Headnotes

COUNSEL: For ERIC SLATER, PLAINTIFF: BRUCE L. NEFF, NEFF AND ASSOCIATES, PHILA, PA USA.

For LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT: WILLIAM C. FOSTER, KELLY, MC LAUGHLIN & FOSTER, PHILADELPHIA, PA USA.

JUDGES: JAY C. WALDMAN, J.

OPINIONBY: JAY C. WALDMAN

OPINION:

MEMORANDUM ORDER

This is an insurance bad-faith action pursuant to 42 Pa. C.S.A. § 8371. Each party has moved to compel a deposition of the other's attorney, and each has moved for a protective order to prevent such a deposition.

The Federal Rules of Civil Procedure do not expressly prohibit a deposition by a party of another party's attorney. See Fed. R. Civ. P. 30(a)(1) (a party may take by deposition "the testimony of any person"). A court, however, for good cause may enter a protective order to prevent a deposition from being conducted. See Fed. R. Civ. P. 26(c).

Many courts have found that it is appropriate to grant such an order to prevent the deposition of a party's attorney by an adversary unless he can show that the information sought is relevant, non-privileged and critical to the preparation of the case and that there is no other [*2] way to obtain the information. See Boughton v. Cotter Corp., 65 F.3d 823, 830 n.10 (10th Cir. 1995); Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); Dunkin' Donuts, Inc. v. Mandorico, 181 F.R.D. 208, 210 (D.P.R. 1998); Jones v. Bd. of Police Commissioners, 176 F.R.D. 625, 626 (W.D. Mo. 1997); Caterpillar Inc. v. Friedmann, 164 F.R.D. 76, 78 (D. Or. 1995); EEOC v. HBE Corp., 157 F.R.D. 465, 466 (E.D. Mo. 1994). See also Lebovic v. Nigro, 1997 U.S. Dist. LEXIS 1897, 1997 WL 83735, at *1 (E.D. Pa. Feb. 26, 1997) (deposition of opposing counsel is "typically only permitted where a clear need is shown"); Kelling v. Bridgestone/Firestone, Inc., 153 F.R.D. 170, 171 (D. Kan. 1994) ("absent an attorney's advice being made an issue in the case, courts should exercise great care before permitting the deposition of an [opposing] attorney"). This is because a deposition of one's attorney by an opposing party is inherently annoying, oppressive, disruptive and burdensome. "Such a deposition provides a unique opportunity for harassment, it disrupts the opposing attorney's preparation for trial, and could ultimately lead to disqualification of opposing counsel if the attorney is [*3] called as a trial witness." Marco Island Partners v. Oak Development corp., 117 F.R.D. 418, 420 (N.D. Ill. 1987).

Defendant states that plaintiff's attorney communicated with a number of defendant's employees in connection with his handling of the underlying underinsured motorist claim. Defendant contends it is "entitled to know whether [plaintiff's attorney] intends to contradict any statement given by any representative of Liberty Mutual or whether he is in possession of any additional information which relates to the case."

Defendant obviously has other means of discovering what its employees may have said to plaintiff's attorney. Plaintiff's attorney cannot meaningfully "contradict" a statement made by an employee of defendant unless he testifies as a witness at trial. There is absolutely no indication that plaintiff's attorney proposes to present himself as a witness and to do so would almost certainly re-

quire his disqualification. See Pa. Rules of Professional Conduct 3.7.

That a party wishes to ask another party's attorney whether he has "any additional information which relates to the case" does not remotely justify the deposition of the attorney. If it did, adversaries [*4] in virtually every case could compel the depositions of each other's attorney. Moreover, any relevant information which is known to a participating attorney in a pending case and is not protected by the attorney-client privilege or work-product doctrine can be discovered by other means such as interrogatories and requests for admission or production directed to the party.

Plaintiff seeks to depose defendant's counsel about his conduct of discovery in this action which plaintiff contends further evinces defendant's bad faith conduct towards plaintiff. Plaintiff asserts that defense counsel unilaterally canceled depositions and has not conducted discovery in an appropriate manner. According to a letter from plaintiff's attorney to defense counsel, the authenticity of which is not challenged, plaintiff also seeks to depose defense counsel to "maintain a level playing field" since defense counsel seeks to depose him.

Plaintiff has attempted to notice the deposition of defense counsel. As the court noted in its order of September 24, 1998, notice is insufficient to compel the attendance of a deponent who is not a party or an officer, director or managing agent of a party. Moreover, the [*5] arguments of plaintiff in support of a protective order to prevent his attorney from being subject to deposition are well-taken. Even assuming that some particular act of defense counsel in the conduct of discovery may be relevant, there has been no showing that plaintiff cannot ascertain and present evidence of such an act without making a witness of defendant's attorney.

Discovery in this case has been quite contentious. The parties have filed an array of discovery motions on matters which ordinarily would not require court involvement. Counsel are admonished that whatever acrimony may exist between their clients, counsel are expected to ensure that discovery is conducted in a diligent, reasonable and professional manner and that any true dispute is resolved in a practical manner without the need for court intervention except as a last resort.

ACCORDINGLY, this 13th day of January, 1999, upon consideration of plaintiff's Motion for Protective Order (Doc. # 24), defendant's Motion for Protective Order (Doc. # 22), plaintiff's Motion to Compel Deposition of William C. Foster, Esq. (Doc # 27) and defendant's Motion to Compel Deposition of Plaintiff's Counsel (Doc. # 25), [*6] **IT IS HEREBY ORDERED** that the Motions to Compel are **DENIED** and the Motions for Protective Orders are **GRANTED**.

BY THE COURT:

JAY C. WALDMAN, J.

LEXSEE 1996 U.S. DIST. LEXIS 10341

DANIELLE ORLANDO V. OPERA COMPANY OF PHILADELPHIA "OCP"

95-CV-3860

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1996 U.S. Dist. LEXIS 10341; 71 Fair Empl. Prac. Cas. (BNA) 639; 68 Empl. Prac. Dec. (CCH) P442,247

July 23, 1996, Decided
July 24, 1996, FILED, ENTERED

DISPOSITION: [*1] Defendant's motion of April 25, 1996 for a protective order precluding the taking of defense counsel's deposition GRANTED.

LexisNexis(R) Headnotes

COUNSEL: For DANIELLE ORLANDO, PLAINTIFF: CHARLES HARDY, PETER KONOLIGE, SPRAGUE AND SPRAGUE, PHILA, PA USA. CAROL L. HARTZ, FOX, ROTHSCHILD, O'BRIEN AND FRANKEL, PHILA, PA USA.

For OPERA COMPANY OF PHILADELPHIA, DEFENDANT: WILLIAM A. WHITESIDE, ALLISON E. ACCURSO, ANNE C. BANCROFT, FOX, ROTHSCHILD, O'BRIEN & FRANKEL, PHILA, PA USA. For ROBERT DRIVER, JACK R. BERSHAD, G. THOMPSON PEW, JR., LAREN PITCAIRN, LAURIE WAGMAN, WALTER SPIRO, KARL H. SPAETH, ALBERT E. PISCOPO, DONALD MYKYTIUK, JOHN P. MULRONEY, ROBERT J. MILLSTONE, SANDE HOLLIN, MRS., JOSEPH J. HILL, JAMES A. GRIGSBY, PAUL JAY FINK, RICHARD A. DORAN, C. CHRISTOPHER CANNON, DEFENDANTS: ANNE C. BANCROFT, FOX, ROTHSCHILD, O'BRIEN & FRANKEL, PHILA, PA USA.

For RUDAS THEATRICAL ORGANIZATION OF NEVADA, INC., RESPONDENT: CARL GRUMER, MANATT, PHELPS AND PHILLIPS, LOS ANGELES, CA USA.

JUDGES: JUDGE RAYMOND J. BRODERICK

OPINIONBY: RAYMOND J. BRODERICK

OPINION:

MEMORANDUM

Broderick, J.

July 23, 1996

Presently before the Court is the Defendant's motion of April 25, 1996 for a protective order pursuant to Fed.R.Civ.P. [*2] 26(c) to preclude Plaintiff's counsel from taking the deposition in this Title VII sex discrimination action of counsel for Defendant Opera Company of Philadelphia. On April 23, 1995 Plaintiff's counsel noticed the deposition of defense counsel who prior to commencement of this action conducted an internal investigation, as counsel to OCP, of Plaintiff's internal complaints that she was being discriminated against by her supervisor. Defense counsel's investigation resulted in an "Investigation Report" dated March 30, 1994 and an "Executive Summary" of that report dated April 21, 1994, copies of which defense counsel has provided Plaintiff. Defense counsel has informed the court that she does not intend to introduce either report at trial.

It is well-settled that opposing counsel does not enjoy absolute immunity from being deposed. However, as set forth in the following comment in 8A Wright & Miller, Federal Practice and Procedure § 2102 (1994), the practice of taking the deposition of opposing counsel should not be encouraged:

> The fact that the proposed deponent is an attorney, or even an attorney for a party to the suit, is not an absolute bar to taking his or her deposition, [*3] although it may be that the attorney-client privilege will provide a ground for refusal to answer some or all questions. But the opportunity to take the deposition of opposing counsel may invite abuse. As the Eighth Circuit observed:

> In recent years, the boundaries of discovery have steadily expanded, and it appears that the practice of taking the deposition of opposing counsel has become an increasingly popular vehicle of discovery. To be sure, the Federal Rules of Civil Procedure do not specifically prohibit the taking of opposing counsel's deposition. See Fed.R.Civ.P. 30(a) (a party may take the deposition of "any person"). We view the increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed only in limited circumstances. [Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)].

Accordingly, the court indicated that a court should permit the taking of counsel's deposition only where it is shown that no other means exist to obtain the information, and that the information sought is crucial to preparation of the case. Other courts have cast a similarly jaundiced [*4] eye on taking the deposition of opposing counsel and imposed similar limitations.

The Plaintiff has advised the court that it seeks to depose defense counsel to ascertain the following: (1) defense counsel's qualifications to conduct the investigation at OCP regarding Plaintiff's internal allegations of discrimination, (2) defense counsel's instructions from the Defendant concerning how to conduct the investigation, (3) the bases of defense counsel's statements in the Investigation Report, and (4) how defense counsel reached her decision as to whom to interview during the investigation. In view of defense counsel's statement that she does not intend to introduce either of the two reports at trial, the reasons set forth by the Plaintiff for deposing defense counsel are not necessary nor relevant to Plaintiff's preparation for the trial in this case.

Accordingly, the Court will grant Defendant's motion for a protective order precluding the taking of defense counsel's deposition.

ORDER

AND NOW, this 23rd day of July 1996, for the reasons stated in this court's order of July 23, 1996;

IT IS ORDERED: Defendant's motion of April 25, 1996 for a protective order precluding [*5] the taking of defense counsel's deposition is GRANTED.

RAYMOND J. BRODERICK, J.